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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-183

BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare, and ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,

Appellants-Defendants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTIANE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	3
Statutes Involved	3
Questions Presented	3
Statement of the Case	3
A. Proceedings Below	3
B. Present New York Foster Care Procedures	5
ARGUMENT—The instant appeal presents several substantial questions of law requiring plenary consideration by this Court	8
1. The Court below erred in finding a constitutionally cognizable "liberty" interest in a foster child's relationship to a particular set of foster parents who provide care to the child pursuant to a contract with the authorized foster-care agency which has legal custody of the child	8
2. The Court below erred in requiring an automatic hearing prior to the transfer of a foster child back to his natural parents or to another foster home, since existing statutory procedures fairly protect the interests of the child	17
Conclusion	26

TABLE OF CASES PAGE

Bell v. *Burson*, 402 U.S. 535 (1971) 8, 15, 20

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 8, 15

Cafeteria & Restaurant Workers Local 473 v. *McElroy* v. *Skrupa*, 372 U.S. 726 (1963) 17

Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 12

In re Gault, 387 U.S. 1 (1967) 14

Ginsberg v. *New York*, 390 U.S. 629 (1968) 10, 16

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 8, 15, 20

Goss v. *Lopez*, 419 U.S. 565 (1975) 15, 16

In the Matter of Jewish Child Care Association of New York [*Sanders*], 5 N.Y. 2d 222 (1959) 5, 11

Joint Anti-Fascist Committee v. *McGrath*, 341 U.S. 123 (1951) 8

Kahn v. *Shevin*, 416 U.S. 351 (1974) 13

Labine v. *Vincent*, 401 U.S. 532 (1971) 25

Matter of Landon v. *Motorola, Inc.*, 38 A.D. 2d 18 (3rd Dept. 1971) 16

Lochner v. *New York*, 198 U.S. 45 (1905) 12

Matter of Malpica-Orsini, 36 N.Y. 2d 568 (1975) 16

Mathews v. *Eldridge*, —— U.S. ——, 44 U.S.L.W. 4224 (February 24, 1976) 21

Meachum v. *Fano*, —— U.S. ——, 44 U.S.L.W. 5053 (June 22, 1976) 8, 9, 13, 14

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 11

Morrissey v. *Brewer*, 408 U.S. 471 (1972) 8, 15, 17

PAGE

North Dakota Pharmacy Bd. v. *Snyder's Stores*, 419 U.S. 156 (1975) 13

People ex rel. Kropp v. *Shepsky*, 305 N.Y. 465 (1953) 5, 11

Perry v. *Sindermann*, 408 U.S. 593 (1972) 8

Pierce v. *Society of Sisters*, 268 U.S. 519 (1925) 11

Prince v. *Massachusetts*, 321 U.S. 158 (1944) 10, 16

Ramos v. *Montgomery*, 313 F. Supp. 1179 (S.D. Cal. 1970), *aff'd. mem.* 400 U.S. 1003 (1971) 12

San Antonio School District v. *Rodriguez*, 411 U.S. 1 (1973) 12, 13

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 11

Spence-Chapin Adoption Service v. *Polk*, 29 N.Y. 2d 196 (1971) 5, 6, 11

Stanley v. *Illinois*, 405 U.S. 645 (1972) 11, 23

Tinker v. *Des Moines School District*, 393 U.S. 503 (1969) 16

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 8, 15

Statutes and Regulations

28 U.S.C. § 1253 3

New York Social Services Law § 383(2) 2, 3, 4, 6, 9

New York Social Services Law § 392 ..... 7, 19

New York Social Services Law § 400 .....2, 3, 4, 7, 19

18 New York Code Rules and Regulations 3450.02 ..15, 22

18 New York Code Rules and Regulations § 450.14 (since renumbered § 450.10) 2, 3, 4, 6, 7, 19

Miscellaneous

PAGE

Goldstein, J., Freud, A. and Solnit, A., Beyond the Best Interests of the Child (Free Press, 1973).. 11

Goode, William, The Family (Prentice-Hall, Inc., 1964) 25

Kadushin, A., Child Welfare Services (second edition; New York, MacMillan Publishing Co., Inc., 1974) 5

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ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTIANE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants Bernard Shapiro, Executive Director of the New York State Board of Social Welfare and Abe Lavine, former Commissioner of the New York State Department of Social Services (defendants below) appeal from the order and judgment of a Three-Judge District Court for the Southern District of New York (POLLACK, J., dissenting) entered April 14, 1976. The District Court order and judgment declared unconstitutional as presently applied New York Social Services Law §§ 383(2) and 400 and 18 New York Code Rules and Regulations ("N.Y.C.R.R.") 450.14* and permanently enjoined the appellants from removing or authorizing the removal of foster children from foster homes in which they have lived continuously for more than one year without notice and a hearing at which the foster parents, foster child and biological parents may present relevant information, and directed defendants to promulgate and publish procedures for said hearings. Such hearings are to be accorded automatically, independent hearing officers are to be provided, and *guardians ad litem* are to be appointed to represent the child whenever the child's age, sophistication and ability to communicate his true feelings warrant it.

Opinion Below

The opinion of the District Court is not yet reported. The majority opinion is reproduced as Appendix "A", Judge Pollack's dissent is reproduced as Appendix "B", and the order of the District Court is reproduced as Appendix "C".

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* Since renumbered 450.10.

Jurisdiction

The order of the District Court was entered on April 14, 1976. Appellants' Notice of Appeal was filed on June 10, 1976 and is reproduced as Appendix "D". The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

Statutes Involved

§§ 383(2) and 400 of the New York Social Services Law, and 18 New York Codes, Rules and Regulations § 450.10 are reproduced as Appendix "F".

Questions Presented

1. Did the District Court err in finding a constitutionally cognizable "liberty" interest in a foster child's relationship to a particular set of foster parents who provide temporary care rather than an adoptive home to the child pursuant to a contract with the authorized foster-care agency which has legal custody of such child?

2. Did the District Court err in requiring an automatic hearing in virtually every case where a foster child who has been in a particular foster home for more than one year is to be transferred back to his natural parents, to another foster home, or to an adoptive home, in light of existing statutory procedures which fairly protect the interests of the child?

Statement of the Case

A. Proceedings Below

Appellees Organization of Foster Families For Equality and Reform and Madeline Smith, Ralph and Christine Goldberg and George and Dorothy Lhotan instituted an

action in the United States District Court for the Southern District of New York for injunctive and declaratory relief seeking the invalidation of New York Social Services Law Sections 383(2) and 400 and 18 New York Codes Rules and Regulations ("N.Y.C.R.R.") Section 450.14 (since renumbered 450.10). These provisions, as described below, set out the procedures pursuant to which an authorized foster-care agency with custody of a child can transfer the child from the foster home in which the agency had placed him back to his natural parents, to another foster home, or to an adoptive home.

The appellees originally not only sought to represent the class of foster parents similarly situated, but also as next friends sought to represent the foster children residing in their homes, and the class of all similarly situated foster children, choosing to define the latter class to include all children in a foster home continuously for a period of one year or longer. Appellees asserted that the New York procedure denied the constitutional due process rights of both the foster parents and the foster children. To forestall the obvious potential for conflict of interest between the asserted rights of those two groups, Judge Carter of the District Court declined to permit appellees' attorneys to continue to represent the class of children, and appointed independent counsel for the children. His decision is reproduced as Appendix "G". The children's counsel, who also is appealing from the decision below, contended throughout the proceedings below that the formalized adversary proceeding sought by the foster parents was neither constitutionally mandated nor in the best interest of foster children.

The defendants are present and former social welfare officials of New York State, New York City and Nassau County, New York, and the Executive Director of the Catholic Guardian Society, a private state-authorized foster care agency. Also parties to the action are five biological moth-

ers of children in the New York foster care system, who were permitted to intervene below as intervenor-defendants on behalf of the class of parents who have voluntarily placed their children into foster care.* The intervenor-defendants also are appealing from the decision below.

B. Present New York Foster Care Procedures

New York has long been recognized as a leader in the development of foster care services. See, e.g., A. Kadushin, Child Welfare Services (second edition; New York, MacMillan Publishing Co., Inc., 1974), at 395. Today New York grounds its foster care system on the basic principle that the placement of a child into foster care is solely a transitional action aimed at the attainment of one of two goals: (1) reunion of the child with his natural parent or parents or (2) if reunion is not feasible, adoption. These goals reflect the paramountcy accorded by New York law to preservation of biological families as a first priority, and in the event that end is unattainable, provision of another permanent home for the child at the earliest possible time. *In the Matter of Jewish Child Care Association of New York* [*Sanders*], 5 N.Y.2d 222 (1959) (purpose of foster care is to prepare child for return to natural family); *People ex rel. Kropp* v. *Shepsky*, 305 N.Y. 465 (1953) (natural mother who gave child up for adoption for two-week period allowed to regain custody absent showing of unfitness); *Spence-Chapin Adoption Service* v. *Polk*, 29

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* Judge Carter of the District Court in an opinion dated March 22, 1976 accompanying the decision of the District Court on the merits of the case certified three classes of litigants: a class of foster parents, a class of foster children, and a class of parents of children in foster care.

Judge Carter's opinion is reproduced as Appendix "E". Appellants believe the certification of the class of plaintiff foster children by the District Court was in error, and respectfully incorporate by reference the arguments raised on that issue by the appellant natural parents in their Jurisdictional Statement to this Court.

N.Y. 2d 196 (1971) (natural mother allowed to regain custody of child from foster parents).

Foster care is neither intended nor desired to be provided on a permanent basis. Foster parents are licensed by the State and provide foster care services pursuant to a contract, receiving a set monthly compensation for each foster child in the home. A child in foster care remains at all times in the legal custody of the state-authorized private foster care agency ("agency") accepting responsibility for him at the request of his parents or, in a minority of cases, the New York Family Court. The contract executed by the foster parent confirms the right of the agency placing out the child to recall him upon request (Appendix "A", p. 8a).

Under current New York law, the agency with custody of a foster child may remove the child from a foster home into which it has placed him by giving the foster parents 10 days written notice of such a removal, N.Y. Soc. Serv. Law § 383(2); 18 N.Y.C.R.R. § 450.10(a), except where an emergency requires immediate removal, 18 N.Y.C.R.R. § 450.10(a). Upon receipt of such written notice the foster parents may obtain a conference with an official of the governmental social services department authorizing the removal. At that conference the foster parents may appear with an attorney, have the proposed action reviewed, be advised of the reasons for the action, and have an opportunity to submit reasons why the child should not be removed. *Id.*

The foster parents' request for a conference automatically stays the child's removal. The conference must be scheduled within 10 days of the foster parents' request, and the social services department's official must make a decision following the conference and issue it in writing within five days after the conference. Removal may not occur until at least three days after notice of the decision is sent to the foster parents. 18 N.Y.C.R.R. § 450.10(b)-

(d). After that decision, the foster parents are entitled to appeal to the department and obtain a fair hearing on the removal decision. N.Y. Soc. Serv. Law § 400; 18 N.Y.C.R.R. § 450.10(c). A written determination must be rendered by the fair hearing officer within 30 days of the hearing. N.Y. Soc. Serv. Law § 400. There is no statutory prohibition to removal of the child during the pendency of the disposition of the fair hearing.

Foster parents have other substantial rights under New York Law. Section 392 of the New York Social Services Law creates a "foster care review proceeding" in the New York Family Court in relation to any child who has remained in foster care for a continuous period of 18 months. N.Y. Soc. Serv. Law § 392(2). In this proceeding the Court may enter an order embodying one of four dispositional alternatives for the child: (1) directing continuation of foster care (2) directing return of the child to his natural parent, guardian or relative (3) directing the private agency to institute a proceeding to free the child for adoption, and permitting the foster parents to institute such a proceeding if the agency fails to act within 30 days, and (4) if the child is already free for adoption, directing that the child be placed for adoption with the foster parents or any other person. N.Y. Soc. Serv. Law § 392(7). The sole criterion for this decision is "the best interest of the child." *Id.* Foster parents may institute such a review proceeding at any time after the 18 month period has passed. N.Y. Soc. Serv. Law § 392(2)(c).

New York City provides an additional administrative procedure for foster parents. They may obtain a pre-removal "independent review" hearing on the record before a disinterested social services official, at which they may have counsel and present witnesses and evidence, cross-examine adverse witnesses, and have access to relevant agency files. A written decision, supported by reasons, must be issued within five days.

ARGUMENT

The instant appeal presents several substantial questions of law requiring plenary consideration by this Court.

1. The Court below erred in finding a constitutionally cognizable "liberty" interest in a foster child's relationship to a particular set of foster parents who provide care to the child pursuant to a contract with the authorized foster-care agency which has legal custody of the child.

The majority decision below held that "before a foster child can be peremptorily transferred from the foster home in which he has been living, be it to another foster home or to the natural parents who initially placed him in foster care, he is entitled to a hearing at which all concerned parties may present any relevant information to the administrative decision-maker charged with determining the future placement of the child". Appendix "A", p. 10a. The District Court found support for this hearing requirement, without parallel in New York law, in the foster child's "right to be heard before being 'condemned to suffer grievous loss', *Joint Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)." Appendix "A", p. 10a.

In so ruling, however, the District Court ignored this Court's well-established holding that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property". *Board of Regents* v. *Roth,* 408 U.S. 564, 569 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Wolff* v. *McDonnell,* 418 U.S. 539 (1974); *Bell* v. *Burson,* 402 U.S. 535 (1971); *Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Meachum* v. *Fano,* —— U.S. ——, 44 U.S.L.W. 5053 (June 22, 1976). This Court has held that a constitutionally cognizable liberty interest can either "originate in

the Constitution", *Meachum* v. *Fano, supra,* at 5057, or find "its roots in state law". *Id.*

The District Court, however, failed to identify a protectable interest, arising from either of these sources, on the part of a foster child in the preservation of his live-in relationship to a particular set of foster parents provided to him by the foster care agency which has custody of him. Since no such interest in fact exists, the District Court erred in applying due process requirements to the foster-care transfer process and imposing upon New York a hearing requirement wholly inconsistent with the decisions of this Court. The District Court's holding portends harm not only for the State of New York, but for the foster children and their parents which New York's foster care system is designed to serve, both of which groups have joined in this appeal.

It cannot be argued that New York law creates any constitutionally cognizable liberty interest whatever in the continuation of the foster care relationship, either for the foster parent or the child. The law of New York unequivocally commits the custody of the child in foster care to the authorized private foster-care agency placing him in a foster home. N.Y. Soc. Serv. Law § 383(2). The effect of a parent's voluntary placement of a child into foster care* is to give over custody of the child to the agency during the foster-care period. The agency retaining custody throughout that period exercises its responsibilities toward the child with regard for his best interests as well as the fulfillment of the primary purpose of foster care—ultimate reunion of the child with his parent or parents.

It is important to recognize that the foster-care agency, acting as the instrumentality of the State, not only has the authority recognized by this Court to exercise control over

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* Voluntary placements comprise approximately 80% of all children in foster care.

the foster children in the *parens patriae* role, *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944) (state ban on employment of minors upheld on *parens patriae* grounds); *Ginsberg* v. *New York,* 390 U.S. 629 (1968) (state ban on sale of sexually-oriented literature to minors upheld), but also acts under the authority conferred upon it by the express consent of the child's natural parents. It is in this latter capacity, as well as in its *parens patriae* function, that the agency determines the most desirable foster residence for the children in its custody. The foster child never acquires a right under New York law to remain in the foster home in which he was initially placed.

Just as New York law permits parents to require any unemancipated minor child in their legal custody to accompany them in a move from one residence to another (no matter how much the child opposes the move) or to require him even to leave the parents' home to take up residence with a relative or friend, so also does New York law permit a foster-care agency having legal custody of a child to require him to leave one foster home and take up residence in another.*

Indeed, appellees did not raise below any claim that New York law creates a cognizable liberty interest in the foster care transfer situation. Instead, they sought to assert a right under the Constitution superior to New York law. That right was to be grounded, appellees contended, in judicial acceptance of a psycho-analytical doctrine recognizing a phenomenon known as the "psychological family".

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* The scope of the agency's discretion in the transfer of foster children as it applies to the appellee foster parents was acknowledged by the District Court, which found no merit in plaintiffs' argument that the realities of the foster care system justify their expectation that their role as foster parents will not be summarily terminated. The Court below pointed to the agreement that every foster parent signs upon assuming responsibility for a foster child —the agreement giving the agency the right at any time to recall the child "upon request". Appendix "A", p. 8a.

The doctrine seeks to replace the traditional notion of the family as a biological unit bound together by blood ties —the concept embraced both by New York (*In the Matter of Jewish Child Care Association of New York* [*Sanders*], *supra; People ex rel. Kropp* v. *Shepsky, supra; Spence-Chapin Adoption Service* v. *Polk, supra*) and by this Court, see e.g., *Stanley* v. *Illinois,* 405 U.S. 645 (1972) (father of illegitimate child may not be presumptively denied parental rights); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) (state ban on teaching of foreign languages in private schools invalidated); *Pierce* v. *Society of Sisters,* 268 U.S. 519 (1925) (state requirement of compulsory public education invalidated); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) (state law permitting sterilization of habitual criminals invalidated)—with a view defining familial relationships primarily by emotional ties.

Under the "psychological family" doctrine, when a biological parent ceases to provide primary care for a child and is replaced for a period of time (varying according to the age of the child from two to perhaps 18 months) by any other parent-like figure (e.g., a foster parent), then the biological family comes to an end and the child becomes a member of a new "psychological family". Proponents (including appellees) argue that this "psychological family" is entitled to the same constitutional deference as that accorded the traditional biological family. The doctrine of the "psychological family" is most extensively set forth in Goldstein, J., Freud, A. and Solnit, A., Beyond the Best Interests of the Child (Free Press, 1973), and Professors Goldstein and Solnit were appellees' major witnesses below. Flowing from the doctrine of the "psychological family", its proponents claim, is a right in the child of such a family not to be separated from his "psychological parents", even to return to his biological parents.

The implications of the "psychological family" doctrine are enormous, but in this case one such implication stands out: acceptance of the "psychological family" doctrine

would foreclose the very existence of a foster care system such as run by New York today. The purpose of the New York system is to provide a child with care in a responsible family other than his own for a period of months or even years in order to permit the child to rejoin his own biological family under happier circumstances in the future. If the Constitution were interpreted to regard the child as having ceased to be a member of his biological family and to have become a member of a new "psychological family" after only a few months or a year with the new family, reunion of that child with his biological family would become a meaningless, unattainable goal. See *Ramos* v. *Montgomery,* 313 F. Supp. 1179 (S.D. Cal. 1970), *aff'd. mem.* 400 U.S. 1003 (1971). Indeed, to accredit the "psychological family" doctrine constitutional status, in the face of State law holding unequivocally to the contrary, would, as shown in Point II below, cripple the New York foster care system.

The "psychological family" doctrine advance by Goldstein, Freud and Solnit has, to say the least, failed to gain general acceptance in the psychiatric and social science academic community. This Court has recognized that it is not the proper role of the Federal judiciary to invalidate State statutes simply for being "incompatible with some particular economic or social philosophy", *Ferguson* v. *Skrupa,* 372 U.S. 726, 729 (1963), because the "constitution is not intended to embody a particular . . . theory", *Lochner* v. *New York,* 198 U.S. 45, 75 (1905) (HOLMES, J., dissenting). The quality and depth of attachments formed in foster care is an area in which, on even the most basic questions, the scholars and experts are divided. *Cf. San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 42-43 (1973). "In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to . . . [these] problems and

to keeping abreast of everchanging conditions". *Id.* at 43; see also *Kahn* v. *Shevin,* 416 U.S. 351 (1974); *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 419 U.S. 156 (1975).

The District Court did not explicitly embrace the "psychological family" doctrine, Appendix "A", p. 9a. However, it made the determination that the transfer of a foster child out of a foster home, even to return to its natural parents, constitutes a "grievous loss" such as to trigger Fourteenth Amendment procedural protections. Lacking support from either precedent or the record before it, the Court turned to "our common past" to find that "the already difficult passage from infancy to adolescence and adulthood will be further complicated by the trauma of separation from a familiar environment". Appendix "A", p. 11a. Based solely on this previously undisclosed introspection, unobservable and unreviewable in nature, the Court below found a constitutional right to a prior hearing on behalf of all foster children, and voided the entire New York foster care transfer procedure. That holding was in error.

In its most recent consideration of the scope of due process rights, this Court unequivocally rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause". *Meachum* v. *Fano, supra,* 44 U.S.L.W. at 5056 (emphasis in original). In *Meachum* it was held that due process interests were not involved in the transfer of a prisoner from one institution in the state prison system to another, even where the transfer produced a substantial adverse impact on the individual. *Meachum, supra,* at 5056. *Meachum* is dissimilar from the instant case in that curtailment of the liberty of an incarcerated person to choose his own place of residence is the result of a conviction. However, this Court's rationale sheds light on the scope of protected liberty interests generally. No procedural protections were called for, since

transfers "often involve no more than informed predictions as to what would best serve . . . the safety and welfare" of the persons involved. *Id.* This Court, therefore, declined to require procedural protections which "would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of . . . administrators rather than of the federal courts". *Id.*

Our society recognizes and desires that the care of a child should be at all times committed to a responsible adult who has ultimate decision-making authority. Due process rights have been accorded to children faced with possible detention by the State, *In Re Gault,* 387 U.S. 1 (1967), which detention could strip the child's parents of control over decisions concerning the child's well-being. However, this Court has never accorded a child any due process rights as against the decision-making authority of his own parent or legal guardian. The fact that the agency representative with legal custody of the child is in this instance an instrumentality of the State should not lessen the traditional reliance on him to exercise responsibility for the well-being of the child.

Moreover, while in *Meachum* this Court referred to the danger that at least some prison transfers could be made for punitive purposes, in the foster care situation no such danger exists. No situation occurs in which the relationship of the agency is adverse to the child. Rather, the sole reason for any transfer is the agency's determination, based on its experience and expertise, of what would best serve the safety and welfare of the child. *Cf. Meachum, supra* at 5056.* The absence of antagonism between the

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* It may be noted that preservation of flexibility in transfer options is particularly important because the initial placement in a foster home may have been precipitated by emergency factors. As Dr. David Fanshel testified in a deposition (4/8/75, pp. 36-37) in the instant case:

"We have studies which show that when children tend to accumulate in public group shelters, agencies become less strict

(*footnote continued on following page*)

agency and the child sharply distinguishes the foster care transfer situation from the usual context in which this Court has found cognizable Fourteenth Amendment interests. See, e.g. *Goldberg* v. *Kelly, supra*; *Bell* v. *Burson, supra*; *Morrissey* v. *Brewer, supra*; *Wolff* v. *McDonnell, supra*; *Board of Regents* v. *Roth, supra.*

Even more than in the teacher-student classroom relationship, the foster child-agency relationship presents no "typical 'conflict of interest.' Rather, the relationship traditionally is marked by a coincidence of interests". *Goss* v. *Lopez*, 419 U.S. 565, 594 n. 13 (1975) (POWELL, J., dissenting) (right to informal hearing prior to suspension from school). Under 18 N.Y.C.R.R. § 450.02 *et seq.*, the agency is required to visit the child in foster care, to maintain planned and regular contacts with the natural parents, and to supervise major decisions in the child's life.

Recognition of a protectable Fourteenth Amendment interest in this case would "subject to judicial review" the decisions of the foster-care agency which are avowedly rendered on the most intangible, complex and non-quantifiable of grounds rather than simply upon any "checklist" of criteria. In this situation a judicial forum is simply unequipped to review the discretionary actions that traditionally have been the business of the experienced child care professionals who make foster care transfer decisions. To graft the traditional adversarial judicial review process onto this system would be to ignore the limitations of that process and the deleterious effect it would produce on all the participants. See *Goss, supra* at 593-94; Point 2, *infra.*

(*footnote continued from preceding page*)

> in the standards they apply in the selection of foster parents, that they tend to take more risks, because they do not wish the child to continue in a large public shelter. But in taking the risks, they have to be ready on a standby basis if things are not working out as was hoped and anticipated, to remove the child, and place the child in another setting."

This Court continues to emphasize that all the procedural safeguards afforded adults in many different contexts are simply inappropriate and unjustified for children. "[T]he experience of mankind, as well as the long history of our law, recogniz[es] that there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and hold office". *Goss, supra* at 590-91 (emphasis in original).

It is the premise that children are "not possessed of . . . full capacity for individual choice", *Ginsberg* v. *New York, supra,* at 649-50 (Stewart, J., concurring in the result), which supports the States' right to impose upon children in a wide variety of situations restrictions that would be "constitutionally intolerable for adults", *Id.* at 650 (footnote omitted), even in so paramount an area as the First Amendment. *Id.*; *Tinker* v. *Des Moines School District,* 393 U.S. 503, 514-15 (1969) (STEWART, J., concurring); *Prince* v. *Massachusetts, supra,* at 167-68.

Foster care is very different from adoption. Yet the rationale of the Court below would convert this contractual arrangement into a quasi-adoption system.* In the words of Dr. Eugene Weinstein in a deposition (3/18/75, pp. 27-28) taken in this case:

> "The threat of possible legal action and the possibility . . . that, placing a child in foster care would lead to the loss of one's child will undermine one aspect of the ideal or the kind of model foster care system that I have talked about.

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* Adoption was unknown under common law and exists solely by authority of statute. *Matter of Landon* v. *Motorola, Inc.,* 38 A.D. 2d 18, 20 (3rd Dept. 1971); *cf. Matter of Malpica-Orsini,* 36 N.Y. 2d 568, 570 (1975).

> This means that parents of foster children, most of whom are poor, will face the possibility of legal action to recover their children which will put them in a very difficult kind of situation . . . This is the danger that the foster care system would be undermined and converted into a kind of a semi-adoption . . ."

It is respectfully submitted that this Court should decline to countenance such a result, and should reject the creation of a "liberty" interest with no basis in the Constitution or State law.

2. The Court below erred in requiring an automatic hearing prior to the transfer of a foster child back to his natural parents or to another foster home, since existing statutory procedures fairly protect the interests of the child.

The error of the Court below did not end with its mistaken discovery of a "liberty" interest requiring due process protections for the foster child in the transfer situation. Even accepting, *arguendo,* the District Court's holding in that regard, the Court also erred in determining "the nature of the process that is due." *Morrissey* v. *Brewer, supra,* at 484. The Court below was singularly unmindful of this Court's repeated admonitions that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstance," *Cafeteria & Restaurant Workers Local 473* v. *McElroy,* 367 U.S. 886, 895 (1961) and that "due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey* v. *Brewer, supra,* at 481. Ignoring these firmly-established guideposts, the District Court imposed upon New York's public foster care agencies a due process scheme inappropriate to the unique and complex operation of the foster care system, and wholly insensitive to the trauma of forcing a child to participate in an essentially adversarial confrontation between two sets of adults (natural parents and foster parents) with an interest in his

welfare, and often having to express a preference between them. Moreover, the risk of leaving a child locked into an inappropriate placement while hearings and judicial review continue is far greater than the "risk" of returning him to his parents, to another foster-care placement, or to an adoptive home.*

The District Court ordered the defendant social services officials to conduct a hearing in every case prior to authorizing the transfer of any foster child in the plaintiff class** (those with continuous residence at their current foster homes for more than one year). At the hearing the natural parents, foster parents and the child himself are all to have an opportunity to present any relevant information to the administrative decisionmaker, and the child, in addition, is to be represented by a disinterested adult whenever in the judgment of the public agency the child's age, sophistication and ability to communicate his own feelings warrant it. These hearings are to be *automatic*—no request from any participant for the hearing is required. In this respect the District Court's order exceeds any due process scheme ever mandated by this Court.

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* As Dr. Fanshel testified in a deposition herein (4/8/75, pp. 47-48):

> "Professionals in the field have recognized that most people cannot be parents to all children. They have certain proclivities. Some children bring out the best in them, some provoke them. Some do it on the basis of their age; when they become more inquiring . . .
>
> So the problem is to anticipate the kind of child who will bring out the foster parents' best qualities in making the match. But that is an imperfect process. It's based upon appraisal of the child and the family. So that the placement must be viewed as an experiment in living. And it demands that the agency pay close attention as to what's going on, because if they mismatch, as has occurred, the child will pay the consequences for that."

** The District Court allowed an exception in emergency situations, in cases where the removal occurs pursuant to court order, or at the request of the foster parents. See Appendix "C", p. 37a.

The District Court by no means inscribed its order on a blank due process slate. Quite to the contrary, as described above, New York has an intricate and indeed evolving scheme of safeguarding the interests of all participants in its foster care system. That scheme provides foster parents with an informal conference prior to removal at which they can present reasons why the child should remain in their home, 18 N.Y.C.R.R. § 450.10, and allows a full fair hearing to the foster parents after removal, N.Y. Soc. Serv. Law § 400. After 18 months of foster care, a child comes under the jurisdiction of the New York Family Court, and the foster parents can invoke that jurisdiction at any time, including immediately prior to the child's removal, to obtain a foster care review proceeding before that court. N.Y. Soc. Serv. Law § 392. These procedures operate to permit administrative and, in some circumstances, judicial review of the transfer decision of the agency, partly prior and partly subsequent to the actual transfer of the child. The transfer decision itself, however, is avowedly and without dispute rendered on the basis of the judgment of the trained social worker given responsibility for the placement of the child in question, upon information gathered from various sources—including the child and the foster parents. This information is collected by personal observation in a variety of situations through the methods of social work rather than law, and the resulting judgment is reached through the processes of social work rather than law.

The District Court's order effectively overrides this judgment of child care professionals and replaces it with something akin to a traditional adversarial, legal decision-making process. The District Court's order requires the hearing to be held before an official not "already acquainted with the agency's version of the background facts", Appendix "A", p. 12a, thus in effect directing the agency to discount all information it has previously gathered on the case, and all observations made in the natural parents' and foster parents' homes. To permit appeal, presumably,

findings of fact would be required and standards of proof would then need to be established. Thus the District Court's order necessarily carries with it a wholesale judicialization of the foster care decision-making process. The imposition of the same due process model used in the denial of welfare benefits, *Goldberg* v. *Kelly, supra* and driver's licenses, *Bell* v. *Burson, supra*, upon the foster care system ignores the complete absence of the critical element of antagonism in the relationship between the child and the agency—the element which has in every case predicated this Court's holding of a need for procedural safeguards for the individual.

If the flexibility of the due process clause hailed repeatedly by this Court has any meaning, it must permit New York to allow foster care transfer decisions to be rendered on the social work-oriented basis it has chosen rather than on the adversarial legal basis preferred by the District Court. New York has decided that the "best interests of the child"—the attainment of which is the goal it shares with appellees, the District Court and every other participant in this litigation—can be best determined by the method it has selected rather than by decision at a judicial-type hearing. A simultaneous goal is the reuniting of the family; if this were not so, then the "most fit" custodian would have a legal right to keep the child in his home, even though parents never adjudicated neglectful or unfit in any way were waiting for the child's return. New York's decision-making process based, as Judge Pollack observed in his dissenting opinion below, "on the disinterested social judgment of professional social workers acting under the aegis of well-conceived tried and tested statutes," Appendix "B", p. 30a, does fully protect the interests of the child, and does not violate the due process rights of children in foster care.

In the 1975 Term, this Court articulated the factors to be considered in determining the constitutional sufficiency under the Due Process Clause of administrative proce-

dures in any specific situation. The Court identified "three distinct factors: first, the private interest that will be affected by the public action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, —— U.S. —— 44 U.S.L.W. at 4229 (no right to hearing prior to termination of social security disability benefits). The application of this analysis to New York's foster care transfer scheme demonstrates beyond doubt the constitutionality of the existing statutory procedures.

The interest at issue, assuming *arguendo* it is constitutionally cognizable, is that of the foster child's relationship to the particular set of foster parents with whom he is placed by his agency. The aim of the "public action" under consideration, as emphasized above, is to reunite the family and to protect the child's interests, not to deny them. Thus, the agency does not seek to remove a child from a foster home except when his interests are served, either by reunion with his natural parent or parents, or by placement with other foster parents better able to serve his needs, or by placement in an adoptive home. The agency has every reason to solicit and respect the desires of the child in formulating any removal decision. Therefore, the risk of "erroneous deprivation" of the child's relationship to a particular set of foster parents is small, in comparison to any situation in which the State's interest is different than and competing with that of the individual.

The probable value of the hearing ordered by the District Court in determining the most suitable placement for the child, then, is minimal. The social worker and agency officials making the decision already have access to each of the parties permitted to participate in the hearing, and can develop all necessary information through the inter-

view and observation process commonly utilized in professional child care. As pointed out *supra,* New York law requires visits with the child in foster care, regular contacts with the natural parents, and supervision of the child's life plan. 18 N.Y.C.R.R. § 450.02, *et seq.* Even the District Court saw its hearing requirement as doing no more than performing a "salutary function of providing the agency with an organized forum in which to gather information," Appendix "A", p. 12a. Beyond denigrating the ability of social workers and other child care professionals competently to gather and organize facts relevant to a foster care transfer decision, the District Court asserted no particular value to the hearing aside from information-gathering. Since the District Court's lack of confidence in the agency social workers' information-gathering skills is absolutely unsupported by the record in this case (the question is hardly raised in the record at all), there is no reason to credit the ordered hearing procedure with any affirmative advantage at all.

By contrast the fiscal and administrative burden to New York of holding as many as several thousand hearings every year, complete with hearing officers and disinterested adult representatives for the subject children, is clearly substantial. The time is long past that New York's social services budget can permit increased administrative overhead expenses without reducing its substantive services elsewhere.

But as important as fiscal integrity is, New York's interests in avoiding the need for hearings prior to foster care transfers goes beyond economics. Such hearings are not merely expensive and unnecessary—they are affirmatively harmful to the foster children and the foster care system as a whole.* Once the hearing procedure has been formalized to the extent required by the District Court,

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* State appellants respectfully incorporate by reference the argument of the appellant children in their Jurisdictional Statement herein on this point, and the argument in the appellant-intervenors' jurisdictional statement that there is no genuine case or controversy between the children and state appellants.

the obvious result will be increasingly frequent judicial review of the agency's decision following the hearing. And since the child has remained in the foster parents' home pending the decision, foster parents will be able without difficulty to obtain stays of unfavorable transfer decisions pending final determination of the judicial review proceeding. During the pendency of those proceedings, to be decided by criteria not yet even known, the foster child would remain in the foster home—the object of litigation, his conflicts and feelings of guilt exacerbated by uncertainty of the outcome of the proceedings. With full appellate review, this state of uncertainty could extend for several years.

A hearing requirement would also inevitably upset New York's policy conferring primacy of parental rights upon natural parents, a policy in accordance with decisions of this Court, see *Stanley* v. *Illinois, supra*, according biological ties superiority over custodial ties. If the transfer decision is to be made upon information brought forth at the hearing, then foster parents will face grave temptation to use their enormous influence over the child in their home to persuade the child to express a preference at the hearing for the foster parents rather than the child's natural parents. This "preference" could tip the decision following the hearing in favor of leaving the child with the foster parents. Yet foster parents have contractual and legal obligations to enhance to the maximum degree the child's relationship to his natural parents. In effect a hearing procedure gives the foster parents license to violate those obligations and to prey on the susceptible mind of the foster child by convincing the child that he wants to remain with the foster parents rather than return to his natural parents. Such a practice would undermine the very purpose of the foster care system.* This danger

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* As Dr. Henry Grunebaum testified in a deposition (4/10/75, pp. 41-42) in this case:

"It seems to me that to the extent to which foster parents

(*footnote continued on following page*)

reinforces the preferability of the social-work observation and interview method of information gathering, since at a private meeting with a social worker, the child would be much more free to express—and the social worker to uncover—his true feelings unencumbered by external influence.

To the extent that New York has introduced hearings into its foster care transfer decision-making process (through the informal conferences for foster parents prior to transfer and the fair hearing after transfer) those hearings adequately provide for protection of the child's interests. Since the child could remain with the foster parents only if they wished to keep him, their invocation of hearing or conference procedures is sufficient to bring any dispute over the child's placement into the social services department's review apparatus.

To the natural mothers of foster children who have voluntarily placed their children into foster care in reliance upon New York's procedure for the return of the child, implementation of the District Court's hearing procedure will be indisputably harmful. Such a mother, who gave up custody of her child in a period of personal stress, will now be told that the rules have changed and that she may not be able to obtain the return of her child until the end of a prolonged legal struggle. In the future, mothers will

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(*footnote continued from preceding page*)

> feel that they can obtain custody of children either de facto or de jure . . . places a potential incentive on the child's foster mother to separate and attenuate the relationship with the child's biological mother which can only be bad for the child. So that I think that, that can only be harmful. It is very analogous to the issue I spoke of earlier about custody. It is in a child's interest to feel that its biological parents are good people, that its heritage is a worthy one; and to the extent where one feels that his heritage has been denigrated, it seems to me to that extent one would suffer identity problems in later life, feeling that there is a part of oneself that is unworthy of respect."

be much more hesitant to utilize the foster care system at all, even in the worst of personal difficulties. The risk of losing a child forever once in foster care will encourage them to seek temporary if less satisfactory solutions outside the formal foster care system.

Finally, it must be recognized that the State has a critical interest in the preservation of the biological family as a central institution in our society. As the noted sociologist Prof. William Goode states in "THE FAMILY" (Prentice Hall, Inc., 1964):

> "The strategic significance of the family is to be found in its mediating function in the larger society. It links the individual to the larger social structure. A society will not survive unless its many needs are met, such as the production and distribution of food, protection of the young and old, the sick and the pregnant, conformity to the law, the socialization of the young, and so on. Only if individuals are motivated to serve the needs of the society will it be able to survive. . . . (at p. 4)
>
> * * *
>
> Thus it is through the family that the society is able to elicit from the individual his necessary contribution. The family in turn, can continue to exist only if it is supported by the larger society . . ." (Pp. 2-3)

As this Court held in *Labine* v. *Vincent,* 401 U.S. 532, 538-539 (1971):

> ". . . [T]he power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States and the people of . . . [the State] to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws."

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, August 6, 1976.

Respectfully submitted,

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SEP 27 PAGE 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-183

BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare; ABE LAVINE, individually and as Commissioner of the New York State Department of Social Services,

Appellants,

against

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, MADELINE SMITH, RALPH and CHRISTINE GOLDBERG, and GEORGE and DOROTHY LHOTAN, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
ARGUMENT	1
1. New York's foster care system, based upon reuniting the family rather than upon conversion of a contractual arrangement into a semi-adoption, is in harmony with due process requirements	2
2. The State's interest in protecting the primacy of the family and the best interests of the child underline the adverse effect which would result from the automatic hearings required by the decision below	4
Conclusion	8

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STATE APPELLANTS' REPLY BRIEF

ARGUMENT

Appellees' Motion to Affirm* (p. 20) argues that the state has "no conceivable interest" in opposing the automatic hearings mandated by the District Court. As will be shown below, the motion makes assertions about New

* Hereinafter, "The Motion".

York's foster care system which are wholly unsupported by the record, and indeed are often contradicted by the evidence. Moreover, appellees make no attempt to analyze or rebut state appellants' arguments as to 1) the state's interest in protecting the primacy of family life, and maintaining foster care as a viable service or 2) the adverse effect of the automatic hearing on the foster children themselves.

1. New York's foster care system, based upon reuniting the family rather than upon conversion of a contractual arrangement into a semi-adoption, is in harmony with due process requirements.

Appellees argue that removals of children from foster care are "peremptory",* and that such decisions are made by individual social workers who each have different views about the case. The record shows, however, that transfer decisions are made not by the caseworker alone but by a team of child care professionals including a unit supervisor and headed by a casework supervisor who has at a minimum a master's degree in social work.** Changes in the child's plan are not the result of reassignment to a different social worker, but evolve from new circumstances in the life of the child, the natural parents, or the foster parents. See affidavit of Bracha Graber;*** *State ex rel. Wallace* v. *Lhotan,* 51 A.D. 2d 252 (2d Dept., 1976).

Equally inaccurate is appellees' claim that children who are to be transferred are not consulted about the deci-

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* Questions Presented, p. 3.

** The active participation of the supervisor is illustrated by the affidavit of Bracha Graber dated May 28, 1974, and filed in the District Court.

*** *Id.*

sion,* and that the foster children of appellees Lhotan were not "asked whether they wanted to leave their foster home"** prior to their return to their natural mother. As the Appellate Division, Second Department opinion in the *Lhotan* case noted, ". . . the social worker's efforts to encourage Mrs. Lhotan to better the children's relations with their mother have caused a shift from subtle to overt hostility on the part of Mrs. Lhotan and . . . the children now refuse to speak to the social worker." (51 A.D. 2d at 255).

Appellees also cite as "typical of the abuses which could occur and which have occurred under the procedures declared unconstitutional,"*** the case of appellee Madeline Smith. Conspicuously absent from the Motion's account of the *Smith* case is the fact that Mrs. Smith is disabled physically by arthritis and the further fact that Mrs. Smith altered a doctor's report dated February 13, 1974 to the Catholic Guardian Society about her condition, obliterating the last sentence which read, "The patient in my opinion is totally disabled." Also omitted is the fact that she is unable to accompany the children to school and that six-year old Danielle must walk five blocks, crossing main thoroughfares not attended by school crossing guards to reach the school building. Because of Mrs. Smith's physical condition, Eric who is nine years old must go several blocks to the store alone and pick up the family's shopping.****

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* See United States District Court transcript, testimony of Florence Creech and Jane Edwards, dated March 3, 1975, pp. 53, 54, 59, 72, 73, 75, 81, 93.

** Motion, pp. 7-8.

*** P. 5.

**** See affidavit of Bracha Graber, *supra*.

The Motion contends further* that the present procedures governing the foster care program are unconstitutional because the pre-removal conferences rarely result in reversal of the initial decision. It is interesting to note that after the City of New York instituted a pre-removal adversary hearing procedure which could be invoked by foster parents when a child is transferred to a different foster home, only 25 requests for a hearing were received in relation to thousands of transfers in the period from July 1, 1974 to March, 1976. Indeed, 1/6 of all children in New York City who are transferred from a foster home are removed by request of the foster parents themselves.**

2. The State's interest in protecting the primacy of the family and the best interests of the child underline the adverse effect which would result from the automatic hearings required by the decision below.

The Motion directs its argument at "contentions"*** never made by appellants, for example that this Court's recent decisions have "narrowed the zone of interests to be accorded due process protection." Appellants had in fact made the opposite point that the ruling in such cases as *Meachum* v. *Fano*, —— U.S. ——, 49 L. Ed. 2d 451 (1976), did not change the law, but merely applied existing constitutional doctrines to reject claims that any "grievous loss" is "sufficient to invoke the procedural protections of the Due Process Clause". Another contention never made by appellants was that "Even if the New York procedures

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* P. 9.

** Affidavit of Carol J. Parry, dated April 7, 1976, filed in the court below.

*** P. 13.

violate the due process rights of foster children, the district court was without jurisdiction . . ."*. The contrary argument was presented by appellants—that since the appellant children and appellant state officials are in agreement as to the constitutionality of the existing procedures, no genuine controversy is presented.

The motion makes no attempt, however, to deal with the positions actually taken in appellants' Jurisdictional Statement: that the State has an interest repeatedly recognized by this Court in establishing and protecting family life; that natural parents would increasingly seek makeshift solutions to child care problems rather than turning to the foster care system, if faced with the threat of losing a child forever once in foster care; that the fiscal and administrative burden to New York of providing more than two thousand hearings is substantial; that children would be hurt by adversary hearings and by the uncertainties and protracted delays involved in judicial review of such hearings, as well as by being locked into unsuitable foster homes; and that an automatic hearing poses a grave temptation to foster parents to use their enormous influence over the child living with them to persuade him to "prefer" them to his own parents. See the Appellate Division opinion in *Lhotan* (51 A D 2d at 253-255):

> "On September 4, 1970, the petitioner voluntarily placed her six children in foster care. At the time she was unable to care for them and had severe emotional problems consistent with post partum depression. . . . The children were never surrendered for adoption and were never intended by the petitioner to be abandoned or permanently alienated . . .
>
> "In December, 1972 the petitioner's condition improved and the boys were returned to her after the Department determined that she was able to care for them. Follow-up visits by Department personnel have

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* P. 13.

shown that the boys are doing very well with the petitioner; no one now questions that she has been a loving and fit mother for the three years that have elapsed since then. . . .

"The Department's records note that, before Cathleen's and Cynthia's removal from the Dunnes to the Lhotans, they had a 'fair relationship' with their mother. After the transfer, the attitude of these two children towards their mother materially deteriorated to a point where they now say that they do not want to see her. . . .

"Numerous visits to the Lhotan home persuaded the social worker that Mrs. Lhotan was not co-operating with the Department to help the children overcome their negative feelings about their mother. The trial record amply supports this view and the Trial Justice so found.

• • •

"On May 22, 1974 the Department referred the matter for a psychiatric evaluation. On June 17, 1974 an 'interdisciplinary conference' was held, attended by professional people of broad experience who had studied the problems of these children. The professionals included (1) Dr. Allen Reichman, a psychiatrist (who had previously interviewed the petitioner and Cynthia, on the basis of which he determined that the petitioner was able to care for the children and that Cynthia 'sort of rattled • • • off [her complaints about her mother] as if they had been rehearsed'; it was his opinion that she was relating something that had been told to her); (2) Dr. Irving Solomon, a diplomate in clinical psychology and a certified psychiatrist (who previously examined Cathleen, whose grievances [he said] sounded rehearsed; it was his opinion that she felt that to accept her mother would be a violation of loyalty to the Lhotans); (3) Roslyn Kantor, a psychi-

> atric social worker; and (4) Estelle Rapoport, a staff psychologist (who had examined Cathleen by Rorschach and thematic apperception tests and found that she appeared to be controlled by others)."

As conceded in the Motion (p. 3), the only arguments in support of the "rights" enunciated by the court below "were advanced by appellee foster parents."* In view of the adverse impact of the District Court decision on the children, the natural parents, the State, and the City, as well as the resultant conflict with this Court's prior Due Process Clause holdings, plenary review by this Court is essential.

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* Since relief was accorded to the children and not the foster parents, and since the foster parents' interests conflict with those of the children (see District Court opinion, Appendix G), obvious problems of standing are raised by the majority decision below. The cases on standing referred to in the Motion (pp. 24-25), are patently inapplicable herein. They involve organizations or persons seeking rights for their members or third parties (rather than for a class with a conflict of interest such as in the case at bar), or plaintiffs who have sought judicial assistance to remedy a legal wrong (rather than plaintiffs such as the children here who consistently assert that no legal wrong has been done). Indeed, two of the cases cited on this point in the Motion support appellants, not appellees; see *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), and *Warth* v. *Seldin*, 422 U.S. 490 (1975).

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court deny the motion to affirm, note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York,
September 16, 1976.

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